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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-493

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

DONALD LANG,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, FIFTH DIVISION

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INDEX

	Page
Opinion Below	2
Jurisdiction	2
Question Presented	2
Constitutional Provisions Involved	3
Statement Of The Case	4
Reasons For Granting The Writ	7
Conclusion	11
Appendix (Opinion and Judgment of Illinois Appellate Court) App. 1	A1

CITATIONS

CASES:

Iverson v. *North Dakota*, 450 F. 2d 414 (8th Cir. 1973) . 7

Jackson v. *Indiana*, 406 U.S. 715 (1972) 5, 6, 7

Ex Parte Kent, 490 S.W. 2d 649 (Mo. 1973) 7

Ker v. *California*, 374 U.S. 23 (1963) 10

Pate v. *Robinson*, 383 U.S. 375 (1966) 6

People ex rel. Meyers v. *Briggs*, 46 Ill. 2d 281, 263 N.E. 2d 109 (1971) 5, 6, 7

People v. *Lang*, 26 Ill. App. 3d 648, 325 N.E. 2d 305 (1975) 4, 5, 6

Wilson v. *United States*, 391 F. 2d 460 (D.C. Cir. 1965) 8

MISCELLANEOUS:

Tidyman, *Dummy*, New York: Little, Brown & Co., 1974 5

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The petitioner, The People of the State of Illinois, respectfully prays that a writ of certiorari issue to review the judgment of the Appellate Court of Illinois, First District, Fifth Division entered in this proceeding on June 30, 1975.

OPINION BELOW

The opinion of the Appellate Court of Illinois reversing and remanding Donald Lang's murder conviction is reported at 26 Ill. App. 3d 648, 325 N.E. 2d 305 (1975). On June 30, 1975, the Supreme Court of Illinois denied both the People's petition for leave to appeal and the defendant's petition for leave to appeal.

JURISDICTION

The decision of the Appellate Court of Illinois was filed on February 14, 1975. The denial of the People's petition for leave to appeal to the Illinois Supreme Court was entered on June 30, 1975. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3), since a right has been especially set up and claimed under the Constitution of the United States.

QUESTION PRESENTED

Whether defendant, a deaf-mute, having elected through his court appointed counsel to stand trial notwithstanding his incompetency, received a trial that comported with due process requirements of the Fifth and Fourteenth Amendments where the State's evidence was so strong that no substantial possibility existed which would have enabled defendant, but for his disabilities, to establish an alibi or other defense.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

United States Constitution, Amendment XIV, Section 1:

> "... [N]or shall any State deprive any person of life, liberty or property, without due process of law. . . ."

STATEMENT OF THE CASE

A.

General Background

In the early afternoon hours of July 26, 1971, the body of Earline Brown was found, stuffed upside down into a closet in Room 201 of the Viceroy Hotel, located at 1519 W. Warren Boulevard, in Chicago. It was determined that Miss Brown had been beaten and strangled approximately 35 hours earlier. The defendant, Donald Lang, a deaf-mute, who is illiterate and virtually unable to communicate, was tried for murder [Illinois Revised Statutes 1971, Ch. 38, § 9-1(a)(1)] of Miss Brown before a jury, and was found guilty. Judgment was entered on the verdict, and after a hearing in aggravation and mitigation, defendant was sentenced to 14 to 25 years imprisonment at the Joliet Reception and Diagnostic Control Center.

Lang appealed his conviction to the Illinois Appellate Court, First District. The appellate court held that the evidence was factually sufficient to support the charge. *People* v. *Lang*, 26 Ill. App. 3d 648, 655, 325 N.E. 2d 305, 310 (1975). However, the appellate court found that absent special trial procedures to negative the effect of defendant's incompetency, he could not be constitutionally tried or convicted. *Id.* at 655, 325 N.E. at 309. The appellate court did not suggest any special compensatory trial procedures. Consequently, the court reversed the trial court judgment and remanded the case with instructions. Two other issues raised by defendant were not considered by the appellate court. The State and defendant filed petitions for leave to appeal in the Illinois Supreme Court. Both petitions were denied on June 30, 1975.

B.

Facts Material To The Question Presented

Defendant was indicted in December, 1965, for the murder of a woman, accomplished in the same manner and under circumstances similar to the murder of Earline Brown in the instant case. Defendant was found physically and mentally incompetent to stand trial. He was committed to the Illinois Department of Mental Health. Two years after commitment the superintendent of the institution to which Lang had been committed concluded that Lang would never acquire the communicative skills needed to participate and cooperate in his trial. Lang's attorney filed a petition for habeas corpus contending that Lang had been committed for life without ever having been given a trial. This petition was denied by the trial court. On appeal, the Illinois Supreme Court held that Lang should have been given a trial to determine whether he was guilty or should be released. *People ex rel. Meyers* v. *Briggs*, 46 Ill. 2d 281, 288, 263 N.E. 2d 109 (1971).[1] The case was reinstated, but the State was unable to proceed to trial because of the death of its principal witness. Defendant was released.

This case was brought to trial in January, 1972. Pursuant to the holding in *Meyers*, defendant had the choice of being committed as he had been before, or to stand trial. His attorney understandingly chose the risk of trial. *People* v. *Lang*, 26 Ill. App. 3d 648, 652, 325 N.E. 2d 305, 308 (1975).[2]

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1. The decision of the Supreme Court of Illinois was discussed in some detail in this court's opinion in *Jackson* v. *Indiana*, 406 U.S. 715, 735-36 (1972).

2. The facts surrounding Lang's trials and convictions were popularly related in *Tidyman, Dummy* (1974), a Book of the Month Club selection.

C.

Manner In Which The Federal Question Was Raised

The Federal question presented herein was originally raised by Donald Lang, by his motion for new trial and arrest of judgment after the entry of the verdict finding him guilty of murder (C. 240-245; Tr. 1576-78).

In its decision reversing Lang's conviction, the appellate court held that "[b]ecause required trial procedures were not provided as mandated by *Meyers, Jackson* (*Jackson* v. *Indiana,* 406 U.S. 715) and *Pate,* [*Pate* v. *Robinson,* 383 U.S. 375 (1966)] the trial in the instant case was constitutionally impermissible, and the conviction of defendant must be reversed and remanded. *People* v. *Lang,* 26 Ill. App. 3d 648, 655, 325 N.E. 2d 305, 310 (1975).

The Illinois Supreme Court denied the State's and defendant's petitions for discretionary leave to appeal. The Federal question presented herein has been properly raised and preserved at all stages of this case.

REASONS FOR GRANTING THE WRIT

Defendant Received A Trial That Comported With Due Process Requirements Of The Fifth And Fourteenth Amendments Where The State's Evidence Was So Strong That No Substantial Possibility Existed Which Would Have Enabled Defendant, But For His Disabilities, To Establish An Alibi Or Other Defense; Furthermore The Illinois Appellate Court's Holding Misconstrues Decisions Of This Court.

Contrary to the holding below, the State submits that prior decisions by this Court do not preclude the trial of defendant nor his conviction. This court stated in *Jackson* v. *Indiana,* 406 U.S. 715, 741: "We do not read this court's previous decisions [citing *Pate* v. *Robinson,* 383 U.S. 375 (1966)] to preclude, *at a minimum,* an incompetent defendant to raise certain defenses such as insufficiency of the indictment, or make certain pretrial motions, through counsel." (emphasis added). This view has been implemented in cases such as *Iverson* v. *North Dakota,* 450 F. 2d 414 (8th Cir. 1973) (preliminary hearing) and *Ex Parte Kent,* 490 S.W. 2d 649 (Mo. 1973). The thrust of the *Jackson* decision was foreshadowed in Illinois in *People ex rel. Meyers* v. *Briggs,* 46 Ill. 2d 281, 263 N.E. 2d 109 (1971). The Illinois Supreme Court held "defendant, handicapped as he is and facing an indefinite commitment because of the pending indictment against him should be given an opportunity to obtain a trial to determine whether or not he is guilty as charged or should be released." 46 Ill. 2d at 288. The manner in which that opportunity is to be arrived at depends upon the "circumstances of the case * * *." *Id.* at 287.

The appellate court implicitly held that the compensatory procedures had to be applied to the person of the defendant, and explicitly held that these procedures had to be applied at trial. In so holding, the appellate court concluded that defendant could not be tried under the circumstances of this case.

The State proposed on appeal a procedure that would compensate for defendant's disabilities and determine whether defendant's conviction was obtained in accordance with due process requirements. Since defendant is incapable of explaining or rebutting the State's evidence, due to his disabilities, the trial judge should assess the degree of probability that the defendant, were he normal, might do so. *Wilson* v. *United States*, 391 F. 2d 460, 463-64 (D.C. Cir. 1968). In order to make this assessment, the trial judge would consider the State's evidence to determine the extent to which this evidence in itself, forecloses the possibility of rebuttal. The strength of the State's evidence will be inversely related to the possibility that a normal defendant could rebut that evidence. As the State's evidence becomes stronger, the possibility that a normal defendant could rebut that evidence is proportionately diminished. When the State's evidence is so strong that it effectively forecloses the possibility of rebuttal by a normal defendant to the extent that it leaves no reasonable doubt in the mind of the trier of fact as to defendant's guilt, then, the State submits, a conviction based on such evidence should be affirmed.

The compensatory procedure set forth above should normally involve an inquiry to be made by the trial judge prior to entering judgment on the jury's verdict. The State submits that in cases such as the present one it would be confusing to submit an instruction to the jury

regarding the possibility of rebuttal by a normal defendant, and it would be more appropriate to require the trial court to make this final determination after the jury has found a defendant guilty in accord with standard procedures and instructions. In the instant case, the trial judge was not asked by either the State or the defense for such a special determination. Neither side felt the need for such a hearing.

However, defendant conceded before the appellate court that there was no issue regarding the credibility of any of the witnesses in this case. Consequently, it was the State's position on appeal that no prejudice could have resulted to defendant if the appellate court were to have made the inquiry and special determination suggested by the People, for the first time on appeal. Such action by the appellate court would not have been a usurpation of either the trial court's prerogative to make this determination or the jury's role in assessing the credibility of witnesses at trial.

The State contends that the facts of this case permit the employment of the proposed compensatory procedure by the reviewing court. Though this procedure should ideally be followed at trial, the fact that witnesses' credibility was not at issue justifies application of this compensatory process by the reviewing court. But the appellate court rejected this proposal. It held that for it to review on this basis would be in violation of *Jackson, Pate* and *Meyers*. It also held that practical compensatory trial procedures could not be provided. The appellate court held that the only fair compensatory procedures would be those which would be applied in the trial court. This erroneous interpretation of the due process clause imposes an impermissibly restrictive standard for prosecution upon the State.

The State submits that the requirements of due process must permit the circumstances of each case to dictate not only the appropriate type of compensatory procedure to be employed, but also the forum in which the procedure is applied. The circumstances of defendant's total deafness and inability to communicate in any meaningful way make it presently impossible for defendant intelligently to appreciate or participate in a trial. Therefore, the appellate court's holding, insofar as it requires compensatory facilities for defendant at trial, erroneously misconstrues this Court's holding in *Jackson*. Defendant's liabilities may lessen his ability and capacity to utilize his constitutional rights, but this should not prevent his being subject to trial.

Here, the appellate court's conclusion of law as to the defendant's Federal right to due process and its finding of facts are so intermingled as to make it necessary for this Court, in order to pass on the Federal question, to analyze the facts as presented by the record in this case. *See Ker* v. *California*, 374 U.S. 23, 33-34 (1963). The State urges this Court to determine whether the State's proposal conforms to due process criteria. Such a determination cannot be made with reference to the substance of the proposal alone. Therefore, the People also urge this Court to consider the suggestion for compensatory procedure in conjunction with the facts of this case as derived from the testimony taken at trial.

The procedure offered to compensate for defendant's disability comports with due process. The Appellate Court of Illinois erroneously concluded that: 1) defendant's trial was unfair and 2) the State's proposed compensatory procedure was inadequate. Furthermore, the appellate court has implicitly adopted an interpretation of due process

that is impermissibly restrictive to the State prosecutor. It fails to comport with even the minimum scope of latitude for prosecution set forth in *Jackson*. Such a restriction contravenes interpretations of due process by the Federal courts or by this Honorable Court. This interpretation is repugnant to the Constitution of the United States.

CONCLUSION

For these reasons the Writ of Certiorari should be granted to review the judgment and opinion of the Appellate Court of Illinois.

Respectfully submitted,

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APPENDIX

APPENDIX

No. 57560

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DONALD LANG, Defendant-Appellant.	Appeal from the Circuit Court of Cook County — Honorable Earl E. Strayhorn, Presiding.

Mr. JUSTICE SULLIVAN delivered the opinion of the court:

Defendant, a deaf mute who was never taught to read or write or to use the sign language and was unable to communicate with anyone in any language, was, nevertheless, tried by a jury and found guilty of the murder of Earline Brown. He was sentenced to 14 to 25 years.

On appeal, it is contended (1) his conviction is constitutionally impermissible absent trial procedures to effectively compensate for his disabilities; (2) the evidence is insufficient to prove his guilt beyond a reasonable doubt; (3) he was denied a fair trial by the introduction of incompetent and prejudicial evidence; and (4) the prosecutor's characterization of his attorney as a racist was plain error.

From the evidence, which was largely uncontested, it appears that defendant was seen leaving a tavern with Earline Brown, and a short time later they were observed entering and going to a room in the Viceroy Hotel. Within

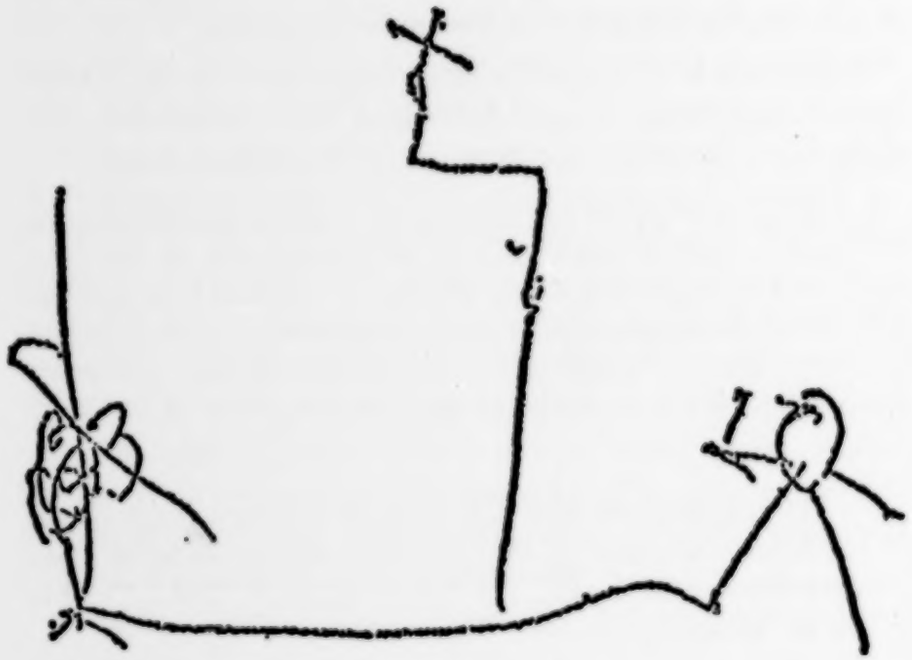
an hour or two thereafter, defendant was observed returning to the lobby of the hotel where he picked up and then hung up the housephone, after which he left the room key at the desk and left the hotel. The next day another couple discovered the body of Earline Brown stuffed in an upside-down position in the closet of the hotel room, with a large pool of blood under her body. She had been physically beaten about the head, face and chest. Death was determined to have been caused by asphyxiation. The hotel had apparently been wiped clean of fingerprints.

Defendant was arrested the same day and, while in custody, the arresting officers observed what appeared to be blood spots on defendant's socks. A laboratory test of his clothing determined there were blood stains on his pants and socks which were of the same blood type as deceased and dissimilar to defendant's own blood. In addition, minute green paint specks of similar chemical composition were found on defendant's pants and Earline Brown's clothing.

There was testimony that defendant had been employed for 12 to 13 years loading and unloading trucks; that he was "pretty strong," and could load and unload trucks by himself.

While defendant was in custody, one of the police officers attempted to communicate with him as to why he was being held. The officer testified that defendant took the pen from the officer's hand and made a drawing on a piece of paper on the table. The drawing consisted of a jagged line in the shape of a stick, and the officer stated that when defendant drew this stick figure—he pointed to it and then pointed to himself. He then drew another figure on the other side and indicated, at least to the officer, that this was a woman. He then pointed to both figures

and moved them up to the top of the jagged line, where he made an "X." He then indicated three fingers, pointed to himself with the three fingers, and then he pointed to the figure of the woman. He then crossed the woman out with another "X" and pointed to himself again. The following is a reproduction of the drawing made by defendant, which was admitted as an exhibit during his trial.



OPINION

The contention that defendant's conviction was constitutionally impermissible centers on the question of his competency to stand trial. This was initially brought into focus in the case of *People ex rel. Myers* v. *Briggs*, 46 Ill. 2d 281, 263 N.E. 2d 109[1]. There, the same defendant was indicted

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1. The complete title is *The People ex rel. Lowell J. Myers, on behalf of Donald Lang* v. *John F. Briggs, Director of the Department of Public Health.*

in December, 1965 for the murder of a woman, accomplished in the same manner and in similar circumstances as the murder of Earline Brown in the instant case. In *Myers,* defendant was first found mentally and then physically incompetent to stand trial by separate juries. Judgments were entered on their verdicts and, pursuant to Section 104-3(a) of the Criminal Code (Ill. Rev. Stat. 1965, ch. 38, par. 104-3(a)[2]), he was committed to the Department of Mental Health until he became competent.

Two years later, Superintendent Edelson, of the Mental Health Institution where defendant was committed, concluded in a letter to the Department's attorney that:

> "[H]e will never acquire the necessary communication skills needed to participate and cooperate in his trial. He has rejected all our efforts to instruct him and has refused to participate and cooperate with his instructor. The probability for his acquiring the necessary communication skills at any future date is unlikely.
>
> • • •
>
> It is apparent now that Donald's future must be decided in a court of law. He will not be able to communicate even in the limited sense as we had first anticipated."

Defendant's attorney, in *Myers,* then filed a petition for habeas corpus, contending that in effect defendant had been committed for life without ever having been given a trial. On appeal, after denial of the petition by the trial

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2. "§ 104-3. Commitment of Incompetent.

(a) A person who is found to be incompetent because of a mental condition shall be committed to the Department of Mental Health during the continuance of that condition."

court, the Illinois Supreme Court held that defendant should have been given a trial, stating at page 288:

> "This court is of the opinion that this defendant, handicapped as he is and facing an indefinite commitment because of the pending indictment against him, should be given an opportunity to obtain a trial to determine whether or not he is guilty as charged or should be released."

The case was then reinstated, but the State was unable to proceed to trial because of the death of its principal witness, and defendant was released.

It appears that no further action was taken concerning the physical or mental condition of defendant until his indictment in the instant case for the murder in July, 1971 of Earline Brown, following which the Public Defender moved for a competency hearing, and defendant was examined by the Psychiatric Institute of the Circuit Court. His condition was diagnosed as "mental retardation with emotional instability: *** not competent to stand trial." However, no competency hearing was held. At trial, he was represented by the court appointed counsel who had handled his appeal in the *Myers* case.

Thus, when the instant case was brought to trial in January, 1972, by virtue of the reasoning of *Myers,* defendant had the choice of being committed as he had been before, as being incompetent to stand trial, pursuant to Section 104-1 *et seq.* of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 104-1 *et seq.*), or to stand trial. His attorney understandingly chose the risk of trial rather than the indicated life confinement as an incompetent.

The trial judge, required by *Myers* to allow defendant his choice of trial, was then confronted with the comment in *Myers* that procedures be provided to assure defendant's constitutional rights, as stated at page 287:

"The general rule in handling the trial of a criminal defendant who is handicapped by deafness, blindness or other affliction is that a trial judge should afford such a defendant reasonable facilities for confronting and cross-examining the witnesses as the circumstances will permit. He need only give such aid to intelligent appreciation of the proceeding as a sound discretion may suggest. The fact of blindness or deafness of the accused may lessen the ability and capacity of the defendant to utilize his constitutional rights, but this will not prevent his being subject to trial. In the proper administration of justice, however, the court should give a person accused of crime a reasonable opportunity to obtain the benefit of his constitutional rights. If he is deaf, such opportunity as may be necessary should be allowed for communication to him of the testimony of the witnesses to insure him a full and fair exercise of his legal rights. The exact manner in which this result should be arrived at must depend on the circumstances of the case and, to a considerable extent, be left to the sound discretion of the court. 14 Am. Jur., § 181, p. 892."

This comment, at least to some extent, seemed to be based on certain other conclusions of Superintendent Edelson; namely, (1) it was his impression that, "Donald is functioning at a nearly normal level of performance in areas other than communication"; (2) "he is capable of fairly complex operations"; and (3) that his commitment "is based on physical and mental incompetence and the probability of appropriate functioning in the former area is doubtful."

Although the court in the above set forth comment referred to protective procedures in handling the trial of a defendant handicapped by deafness, blindness or other affliction, it gave no indication as to how a trial judge should conduct the trial of a defendant who could not

communicate. Nevertheless, from our examination of the record, it is apparent that the very able trial judge here, insofar as was possible, conducted the trial in accordance with the *Myers dictates,* but it also appears quite clear that there were no trial procedures which could effectively compensate for the handicaps of a deaf mute with whom there could be no communication.

It is also evident that defendant was incompetent to stand trial, as this phrase was then defined in Section 104-1[3]. (Ill. Rev. Stat. 1971, ch. 38, par. 104-1.) In *Myers,* defendant had been found physically and mentally incompetent, and no action had been taken prior to the trial of the instant case to restore his competency. Under such circumstances, it is presumed that the conditions continue. (*People* v. *Santoro,* 13 Ill. App. 3d 426, 301 N.E. 2d 175.) Furthermore, after his indictment here, the Psychiatric Institute of the Circuit Court found him mentally retarded and incompetent to stand trial. Most significantly, the following admission of defendant's incompetence appears in the State's brief:

"The defendant, Donald Lang, has been totally deaf since infancy. It was uncontested at his trial that he has always been unable to communicate in any manner save the most obvious of physical gestures. There can be no doubt that the nature and extent of the de-

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3. "§ 104-1. For the purpose of this Article, 'incompetent' means a person charged with an offense who is unable because of a mental condition:

(a) To understand the nature and purpose of the proceedings against him; or

(b) To assist in his defense; or

(c) After a death sentence has been imposed, to understand the nature and purpose of such sentence."

> fendant's disabilities made it impossible for him to understand the nature of the charge against him or to assist his attorney with his defense."

That his incompetency was unquestioned is further indicated from the record, which discloses that his trial attorney stated in the motion for new trial that repeated efforts to communicate with defendant were futile; that the remaining members of defendant's family all testified they have never been able to communicate with him beyond the pantomine of simple requests; and that four counsellors and teachers of the deaf testified they were unable to achieve any meaningful communication with him.

In *Pate* v. *Robinson,* 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815, the United States Supreme Court held that the conviction of a defendant not competent to assist in his own defense violates due process unless there are compensating procedures to overcome his handicap. Later, that court, in *Jackson* v. *Indiana,* 406 U.S. 715, 92 S. Ct. 1845, 32 L. Ed. 2d 435, held that the indefinite pre-trial commitment of one permanently incompetent to stand trial violated his equal protection and due process rights, stating at page 738:

> "[T]hat a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant."

In view of the foregoing, we have reached a number of conclusions:

1. Although defendant's attorney chose the risk of trial for him rather than an indicted permanent confinement as an incompetent, we do not accept the State's contention that defendant should be bound by this choice. It was made by his attorney but, because of the lack of ocmmunication, it appears quite obvious that defendant could not have participated in the decision;

2. We disagree with the contention of the State that our inquiry should be directed toward the issue of whether the State's evidence is so strong that the possibility of rebuttal by a normal defendant would be so slight as to preclude any reasonable doubt of defendant's guilt. We believe that to review on such a basis would be in violation of the constitutional mandates of *Jackson, Pate* and *Meyers,* which foreclose the trial and conviction of an incompetent criminal defendant unless procedures were devised to compensate for his disabilities;

3. Because of the total lack of ability to communicate with defendant, it appears that practical trial procedures could not be provided to compensate for his disabilities;

4. That absent such special trial procedures to negative the effect of his incompetency, he could not be constitutionally tried or convicted.

5. From our examination of the record, we disagree with the contention of defendant that the evidence was insufficient to prove his guilt beyond a reasonable doubt. There was positive identification of defendant leaving the tavern with Earline Brown and entering the hotel a short time later. There was also positive testimony that he came down from the room an hour or two later and was seen picking up the house phone, dropping the room key at the desk and then leaving the hotel. Her body was found in the room rented to them. In addition, there was testi-

mony that she had been physically beaten which, in the opinion of Dr. Kearns, was by means of a blunt instrument such as a club or fist. Furthermore, it was determined that defendant had type "O" blood and deceased had type "B" blood, and that the blood stains on defendant's clothing were of type "B." There was also testimony from hotel employees that no other persons were seen in the vicinity of the room, and that there was no screaming or loud talk heard coming from he room. We believe that the evidence was factually sufficient to support the charge.

Because required trial procedures were not provided as mandated by *Myers, Jackson* and *Pate,* the trial in the instant case was constitutionally impermissible, and the conviction of defendant must be reversed and the case remanded.

In view of the above conclusions, it will not be necessary to consider the remaining contentions of defendant (1) that he was denied a fair trial because of the admission of improper evidence; and (2) that a comment by the prosecutor that his attorney was a racist constituted plain error.

This brings us to the question of the future disposition of the charge against defendant. In this regard, we note that the problems associated with the disposition of a defendant with whom there can be no communication are difficult and complicated. Historically, the concept of incompetency to stand trial is an extension of the common law ban against trials *in absentia.* At common law, it was believed that the incompetent defendant was mentally "absent" from the trial and would not be able to recall evidence or produce evidence that might acquit him or permit him to properly assume the role of defendant, and thus he would be deprived of his due process rights.

However, withholding a criminal trial until competent to stand trial, with the resultant possibility of permanent commitment, is more unfair to the incompetent defendant. This problem was recognized by the court in *Myers,* but as pointed out above, the court did not suggest or indicate the procedures that could be provided to protect defendant's rights. *Jackson,* although prohibiting the indefinite commitment of persons permanently unfit to stand trial or persons who will not be restored to fitness within a reasonable period of time, also left unanswered the question of the trial procedures necessary to effectively compensate for the inability to communicate.

In Illinois, it is apparent that the legislature was cognizant of the problem from its repeal of Section 104-1 *et seq.* of the Criminal Code, in effect at the time of defendant's trial, which provided, among other things, that a person not competent to stand trial because of a mental condition "shall be committed to the Department of Mental Health during the continuance of that condition."

Replacing that section, as of January 1, 1973, is Section 1005-2-1 *et seq.* of the Unified Code of Corrections (Ill. Rev. Stat. 1973, ch. 38, par. 1005-2-1 *et seq.*).

Subparagraph (a) thereof provides that a defendant is unfit to stand trial or to be sentenced if, because of a mental or physical condition, he is unable:

"(1) to understand the nature and purpose of the proceedings against him; or

(2) to assist in his defense."

We note also that the United States Supreme Court in *Dusky* v. *United States,* 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824, stated the test for determining competency to stand trial as follows:

> "[W]hether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has rational as well as factual understanding of the proceedings against him."

Here, it appears that defendant presently remains incompetent to stand trial because (1) he was found to be mentally and physically incompetent in *Myers* and, no restoration action having been taken, there is a presumption that the conditions continue, (*Santoro*); (2) the record clearly establishes the past inability to communicate with defendant; and (3) the State has admitted in its brief that "there can be no doubt that the nature and extent of defendant's disabilities made it impossible for him to understand the nature of the charge against him or to assist his attorney with his defense."

It might be said that there remains no question as to defendant's incompetency to stand trial and, indeed, that this court could so find and, on remandment, that we should direct that he be hospitalized under the provisions of Section 1005-2-2, which, among other things, provides in subparagraph (a) that "the court shall remand the defendant to a hospital as defined by the Mental Health Code of 1967[4], and shall order that a hearing be conducted in accordance with the procedures, and within the time periods, specified in such Act." However, we will not direct this course of action, for the following reasons:

(1) There is the possibility that his condition may have improved to the extent that he may not now be unfit to stand trial, in which event compensating trial procedures should be devised for his retrial if any disability remains;

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4. Ill. Rev. Stat. 1973, ch. 91½, par. 1-1, *et seq.*

(2) There has been no finding of defendant's unfitness to stand trial, as defined in subparagraph (a) of Section 1005-2-1 of the Unified Code of Corrections, which replaced the defining section in effect at the time of his trial; and

(3) There has been a change in the language from "incompetence" to stand trial "because of a mental condition" in the repealed section to "fitness to stand trial "because of a mental or physical condition." The Council Commentary (S.H.A., ch. 38, par. 1005-2-1) states that, "Fitness speaks only to a person's ability to function within the context of trial, whereas the term 'competence' is a mental health term dealing with whether an individual should be committed to an institution or not, and excludes consideration of physical fitness."

Subparagraph (c) of Section 1005-2-1 provides that "when a *bona fide* doubt of the defendant's fitness to stand trial or be sentenced is raised, the court shall order that a determination of that question be made before further proceedings."

Here, it is our opinion that a *bona fide* doubt exists as to defendant's present fitness to stand trial and that a new hearing should be held. Therefore, we direct, on remandment, that the trial court order a determination of that question, as provided in Section 1005-2-1. Thereupon, if defendant is found fit for trial, he shall be retried with procedures provided to compensate for existing disabilities, if there be any, as required by *Myers, Jackson* and *Pate.* If he is found unfit, the trial court shall proced in accordance with the provisions of Section 1005-2-2. Thereafter, if he should be found fit for trial, methods should be provided to compensate for any disabilities.

The concern of the State, in view of the strong circumstantial proof of murder here and because he was allegedly a murderer in *Myers* (both murders were accomplished in the same manner and in similar circumstances), that defendant might be released and thus present a potential danger to society should be allayed, because (1) under the present Mental Health Code, he could be institutionalized if (a) he is found to be a person in need of mental treatment, as defined in Section 1-11 of the Mental Health Code, or (b) if he is found to be mentally retarded, as defined in Section 1-12; and (2) that although subparagraph (a) of Section 1005-2-2 of the Unified Code of Corrections provides that the question of whether to institutionalize is determined at a civil commitment hearing under the Mental Health Code, subparagraph (b) provides for review at stated intervals by the trial court of the issue of continued hospitalization.

It would appear that subparagraphs (b) and (c) of Section 1005-2-2 were intended by the legislature to remove the possibility of the permanent commitment of an incompetent defendant. As we stated above, subparagraph (b) provides for periodic review of the commitment issue and subparagraph (c) limits any possible confinement in a mental health institution to the maximum sentence that could be imposed for the offense charged and provides for dismissal when that term is reached. It is noted that Section 1005-8-1 of the Unified Code of Corrections provides that the maximum term for murder shall be "any term in excess of 14 years." It should also be noted that *Jackson* requires that the commitment of an incompetent defendant should be for only a "reasonable" length of time and should be justified by progress toward restoration. *Jackson* did not set any standard as to what would be reasonable,

leaving it to the facts and circumstances of each particular case and, in the instant case, if defendant is confined, it will only be after periodic reexaminations by the trial court that the question of the reasonableness of the length of his confinement may be determined.

In any event, we are of the opinion that the procedures outlined above satisfy, although minimally[5], the requirements of *Myers, Jackson* and *Pate* and, having reversed the conviction, we remand with directions that action be taken consistent with the consent of this opinion.

Reversed and remanded with directions.
DRUCKER, J. and LORENZ, J. concur.

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5. We understand that mental health problems are presently under study by the Governor's Commission for Review of the Mental Health Code of Illinois. This Commission, chaired by Judge Joseph Schneider, is considered to be eminently qualified in this field. It is hoped that their study and recommendations will include the difficulties occasioned in the disposition of charges against incompetent criminal defendants.

STATE OF ILLINOIS

OFFICE OF

CLERK OF THE SUPREME COURT

SPRINGFIELD

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Clerk

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June 30, 1975

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No. 47467—People State of Illinois, petitioner, vs. Donald Lang, respondent. Leave to appeal, Appellate Court, First District.

You are hereby notified that the Supreme Court today denied the petition for leave to appeal, in the above entitled cause.

Very truly yours,

CLELL L. WOODS,

Clerk of the Supreme Court.

CLW: ja